Re Haji Khalid bin Abdullah, ex p Danaharta Urus Sdn Bhd

HIGH COURT (KUCHING) — BANKRUPTCY PROCEEDINGS NO 29-54 OF 2005-III (II)
DAVID WONG JC
24 FEBRUARY 2006

Bankruptcy — Notice — Setting aside — Whether bankruptcy notice premature — Whether consent order controlled by a subsequent settlement agreement

On 24 June 1998, BBMB issued a writ of summons against the debtor to claim for amount owing for overdraft facilities granted by BBMB to the debtor. On 7 May 1999, BBMB's rights title and interest was vested into Danaharta Urus Sdn Bhd, the creditor. An order granted by the court to substitute the creditor as the plaintiff in place of BBMB. Subsequently, a consent judgment was entered. The creditor and the debtor entered into an agreement for payment of the outstanding amount of RM3,220,670.44 pursuant to a letter dated 16 December 2004. On 9 March 2005, the creditor issued a bankruptcy notice against the debtor as the debtor had defaulted in the terms of the consent judgment. The debtor applied to set aside the bankruptcy notice This was an appeal against the senior assistant registrar's decision dismissing the application by the debtor to set aside a bankruptcy notice. The debtor's contention was substantially that the bankruptcy notice was issued prematurely by the creditor. The basis of this contention was that the bankruptcy notice was issued pursuant to the consent judgment which was now controlled by an outside agreement dated 16 December 2004, hence any bankruptcy notice issued pursuant to the consent judgment was invalid.

Held, dismissing the appeal:

(1) The outside agreement specifically provided that the settlement sum be paid by installments and the consideration of which was that the debtor will get a substantial discount to the outstanding amount due. The definition of the word 'default' at the outside agreement provided that any failure to comply with any obligation or undertaking under the outside agreement was deemed default and the consequence was that the creditor was entitled to demand for the total outstanding amount of RM3,220,670.44. Once the debtor defaults under the installment payments schedule, the debtor was obliged to pay the outstanding amount. There was a specific provision in the outside agreement giving the right to the creditor to claim for outstanding amount due. So the question of the outside agreement controlling the consent judgment did not arise once at all; *Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd* [1992] 2 MLJ 687 distinguished.

[Bahasa Malaysia summary

Pada 24 Jun 1998, BBMB mengeluarkan satu writ saman terhadap penghutang bagi menuntut jumlah yang kenabayar dibawah kemudahan oberdraft yang dikeluarkan oleh BBMB kepada penghutang. Pada 7 Mei 1999, BBMB meletakhakkan hakmilik dan kepentingan kepada Danaharta Urus Sdn Bhd, pemiutang. Satu perintah dikeluarkan mahkamah untuk menggantikan pemiutang dengan BBMB sebagai plaintif. Kemudian dari itu, satu perintah persetujuan dimasukkan. Pemiutang dan penghutang memasuki satu perjanjian untuk membayar jumlah tertunggak sejumlah RM3,220,670.44 melalui surat bertarikh 16 Disember00 2004. Pada 9 Mac 2005, pemiutang mengeluarkan satu notis kebankrapan terhadap penghutang kerana penghutang telah melanggar terma-terma penghakiman persetujuan. Penghutang memohon untuk mengenepikan notis kebankrapan tersebut. Ini merupakan rayuan terhadap keputusan Penolong Kanan Pendaftar yang menolak permohonan penghutang untuk mengenepikan notis kebankrapan tersebut. Penghutang mendakwa yang notis kebankrapan tersebut dikeluarkan pramatang oleh pemiutang. Asas dakwaan tersebut ialah notis kebankrapan tersebut dikeluarkan berhubung dengan perintah persetujuan yang mana sekarang ini adalah dibawah kawalan satu perjanjian bertarikh 16 Disember 2004 (perjanjian tersebut), maka sebarang notis kebankrapan yang dikeluarkan berhubung dengan perintah persetujuan tersebut adalah tidak sah.

Diputuskan, menolak rayuan:

(1) Perjanjian tersebut secara khususnya memperuntukkan bahawa jumlah penyelesaian dibayar secara ansuran dan sebagai balasan penghutang mendapat diskaun yang besar terhadap jumlah tertunggak yang kenabayar itu. Tafsiran perkataan 'ingkar' dalam perjanjian tersebut ialah sebarang kegagalan untuk mematuhi sebarang obligasi atau akujanji dibawah perjanjian tersebut dan akibatnya pemiutang akan berhak untuk menuntut jumlah penuh jumlah tertunggak sebanyak RM3,220,670.44. Apabila penghutang ingkar membuat bayaran ansuran mengikut jadual, penghutang hendaklah membayar jumlah tertunggak tersebut. Terdapat peruntukan khusus di dalam perjanjian tersebut yang memberi hak kepada pemiutang untuk menuntut jumlah tertunggak yang kenabayar. Maka persoalan sama ada perjanjian tersebut mengawal perintah persetujuan tidak timbul sama sekali, *Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd* [1992] 2 MLJ 687 dibezakan.]

Notes

For cases on setting aside bankruptcy notice, see *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2582–2621.

Cases referred to

Metramac Corporation Sdn Bhd v Fawziah Holdings Sdn Bhd [2006] MLJU Lexis 2 (refd)

Re Loh Kok Huah ex parte Ban Hin Lee Bank Bhd [1992] 1 MLJ 687 (refd)

Roland Thomas Tudin (Messrs Besar @ Talip) for the debtor.
Lim Lip Tze (Reddi & Co) for the creditor.

David Wong JC:

[1] This is an appeal against the senior assistant registrar's decision dated 5 October 2005 to dismiss an application (encl 6) by the appellant/debtor (hereinafter referred to as the debtor) to set aside a bankruptcy notice dated 9 March 2005 issued by the respondent/creditor (hereinafter referred to as the creditor).

[2] The brief facts of this case are clearly set out by the creditor's counsel with some amendments.

[3] The debtor's contention is substantially that the bankruptcy notice dated 9 March 2005 (hereinafter referred to as the bankruptcy notice) was issued prematurely by the creditor. The basis of this contention is that the bankruptcy notice was issued pursuant to the consent judgment dated 9 December 2004 which is now controlled by an outside agreement dated 16 December 2004, hence any bankruptcy notice issued pursuant to the consent judgment is invalid. The case of *Datuk Mohd Sari Bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd* [1992] 2 MLJ 687 was cited as authority for the aforesaid contention.

[4] The outside agreement was in a form of a letter made between the parties.

[5] The debtor's counsel refers to the top of p 2 of the outside agreement which states that the full settlement sum shall be paid on or before 30 November 2005 and submits that since the bankruptcy notice was issued prior to 30 November 2005, it is bad as there was no debt due to the creditor prior to 30 November 2005. Whether or not this contention sustains depends on the construction of the outside agreement. In construing any document it is trite law that one must look at the whole document and not on an individual clause in isolation as is being done by the learned counsel for the debtor. There is no dispute here that the creditor and the debtor had come to an agreement as to the repayment of the outstanding sum of RM3,220,670.44 as at 31 October 2004 and the main thrust of which is that the debtor will get a reduction from the outstanding debt of RM3,220,670.44 to RM2,480,000.00 provided that there is compliance by the debtor to the terms of repayment set out on p 1 of outside agreement.

[6] The reality of the matter is that the debtor up till now had not paid one cent pursuant to the outside agreement. Learned counsel for the debtor however submits that the debtor's failure to pay is of no consequence as the settlement sum of RM2,480,000 was not due when the bankruptcy notice was issued on 9 March 2005. With respect, such an interpretation to the outside agreement is not a reasonable one. The outside agreement specifically provides that the settlement sum be paid by installments and the consideration of which is that the debtor will get a substantial discount to the outstanding due. The interpretation given by the debtor's counsel

would only make sense if there are no provisions to the payment of the settlement sum by installments and to a default eventuality. A

[7] This brings me to the consideration of the default eventuality clause and the consequence thereof. The definition of word 'Default' is at p 2 of the outside agreement which provides that any failure to comply with any obligation or undertaking under the outside agreement (payment of installments amounts is definitely an obligation) is deemed a default and the consequence is that the creditor is entitled to demand for the total outstanding amount of RM3,220,670.44. Hence my interpretation of the outside agreement is that once the debtor defaults under the installment payments schedule, the debtor is obliged to pay the outstanding amount. B C

[8] Here the creditor did not demand for the total outstanding amount of RM3,220,670.44 but generously only claimed for the settlement sum of RM2,480,000 which is also the judgment sum. Claiming for a lesser amount than the actual debt due in a bankruptcy notice does not invalidate the same. This of course is conceded by the learned counsel for the debtor. D

[9] As for the case of *Datuk Mohd Sari Bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd,* I agree with learned counsel for the creditor who submitted that the factual matrix there are completely different to the present appeal. In that case, a consent judgment had been recorded against the appellant (debtor) on 27 November 1987 for the sum of RM530,000 together with interest thereon at the rate of 8% per annum from 5 June 1986 to date of realization and RM350 as costs. About a year later the parties came to an agreement to repay the judgment sum of RM530,000 by way of monthly installments of RM25,000 each commencing 31 January 1989 without making any provisions for the eventuality of default in the payment of any installments by the debtor. Upon default by the debtor in paying the installments, the creditor issued a bankruptcy notice against the debtor for the balance of the amount due. The debtor applied to set aside the bankruptcy notice on the ground that there is no provision to allow the judgment creditor to take bankruptcy proceedings for the balance due in the event of default by the debtor. The Supreme Court on appeal from the High Court upheld that argument and set aside the bankruptcy notice. E F G

[10] In our present case, there is a specific provision in the outside agreement giving the right to the creditor to claim for outstanding amount due. So the question of the outside agreement controlling the consent judgment does not arise once at all. In fact the creditor was only exercising its rights under the outside agreement. As stated earlier, the creditor could have very well claimed for the outstanding sum of RM3,220,670.44 but instead opted to claim for the judgment sum of RM2,480,000. If of course the creditor concedes that the bankruptcy notice is invalid and withdraws the same, they could issue a fresh bankruptcy notice for RM3,220,670.44 which the debtor would be hard pressed to dispute in view of the stand taken of the debtor in this proceeding. I say this because the debtor cannot have the cake and eat it or in legal terms 'he cannot not approbate and reprobate an agreement'. In the recent Court of Appeal decision in the case of *Fawziah Holdings* H I

Sdn Bhd v Metramac Corporation Sdn Bhd and Metramac Corporation Sdn Bhd v Fawziah Holdings Sdn Bhd (2006) MLJU Lexis 2, the learned judge Gopal Sri Ram JCA puts it this way:

> In the second place, the right to avoid a transaction carries with it some limitations. You cannot affirm so much of a transaction as benefits you and seek to avoid that part of it that imposes a burden. You cannot pick and choose. You must either affirm the whole transaction or avoid the whole of it. There is no half-way house. Take the present instance. There are many clauses in the sale and purchase agreement. Some confer benefits on the defendant. Others may appear burdensome. Also there are several interlocking agreements entered into between the parties. Again, some may be beneficial and others burdensome. What the defendant is seeking to do here is to avoid selected parts of the transaction. It is seeking to approbate and reprobate. It cannot do that".

[11] The final argument put forth by the learned counsel for the debtor is that because of a pending foreclosure proceeding of a land property by the creditor, the bankruptcy notice is bad as the amount due remains uncertain. He relies on the authority of *Re Loh Kok Huah ex –parte Ban Hin Lee Bank Berhad* [1992] 1 MLJ 687 for his contention. Again with respect, that case does not advance the debtor's case. As correctly pointed out by the learned counsel for the creditor, the charged land in that case was sold after the issuance of the bankruptcy notice and the court there held that the amount stated in the bankruptcy notice remains correct and valid despite the fact the proceeds from the sale was paid in after the issuance of the creditor petition. This is what Mohd Dzaiddin J(as he then was) said:

> The balance of the purchase price was paid on 7 April 1990 in compliance with the condition of sale which fixed the completion date to be three months after the sale. The full purchase price of $183,500 was finally paid to the bank under s 268 on 17 June 1990. Therefore, when the creditor's petition was filed on 9 April 1990 the bank had not been paid the sum of $183,500. Hence, the amount claimed in the bankruptcy notice ie $249,606.36 remained as the amount actually due from the debtor to the bank as at the time when the creditor's petition was filed.

[12] The above arguments were the only ones put forth by the learned counsel for the debtor in this appeal. I have not dealt with the other points raised before the senior assistant registrar which were not raised here as they are taken to be abandoned by the debtor's counsel.

[13] For reasons stated above, I hereby dismiss this appeal with costs to the creditor to be taxed unless agreed to by the parties.

Appeal dismissed.

Reported by Peter Ling